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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GRANT T. LINDSAY, F. BRUCE STEVENS,
RUSSELL M. RASMUSSEN, and THOMAS C. LABAU,

Petitioners,

v.

THIOKOL CORPORATION and THIOKOL
CORPORATION PENSION PLAN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTION PRESENTED

1. Whether employers may lawfully establish a "normal retirement age" greater than 65 for ERISA-covered pension plans, notwithstanding the statutory definition of "normal retirement age" in ERISA, 29 U.S.C. § 1002(24), which by its terms makes age 65 the upper limit.

PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the court whose judgment is sought to be reviewed, all of whom are listed in the caption, are Grant T. Lindsay, F. Bruce Stevens, Russell M. Rasmussen, Thomas C. LaBau, Thiokol Corporation and Thiokol Corporation Pension Plan. In addition, plaintiffs sought to certify a class consisting of persons who are or have been participants in Thiokol Corporation Pension Plan, or the beneficiaries or estates of any such persons, at any time on or after January 1, 1991, but the trial court never ruled on class certification.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals for the Tenth Circuit is reported at 112 F.3d 1068, and is reprinted in the Appendix hereto at 1a, *infra*.[1] The opinion of the District Court for the District of Utah is unreported and is reprinted at App. 10a.

JURISDICTION

The court of appeals entered its judgment on April 18, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant sections of ERISA and the Internal Revenue Code are set forth in the Appendix at 17a - 22a. Section 3(24) of ERISA,

1. "App." refers to the Appendix to this Petition. "Aplt. App." refers to the Appellants' Appendix filed with the Tenth Circuit.

29 U.S.C. § 1002(24), and the identical "mirror-image" provision in § 411 of the Internal Revenue Code, 26 U.S.C. § 411(a)(8), both define "normal retirement age" as follows:

> For purposes of this [subchapter/section] the term "normal retirement age" means the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) *** the time a plan participant attains age 65....

App. 17a, 18a.

STATEMENT OF THE CASE

Respondent Thiokol Corporation sponsors a pension plan which it amended, effective January 1, 1991, to raise the "normal retirement age" under the plan from age 65 to age 67. Thiokol has taken the litigation position that it could lawfully have raised the "normal retirement age" under its plan to an age *greater* than 67 had it chosen to, that ERISA imposes no limit on how high a plan's "normal retirement age" can be set. Aplt. App. 1494.

"Normal retirement age" is defined by ERISA, 29 U.S.C. § 1002(24), and by the "mirror-image" provision of the Internal Revenue Code, 26 U.S.C. § 411(a)(8). App. 17a, 18a. Both statutes identically define it as the earlier of: (a) the "normal retirement age" specified in an employer's plan documents or (b) age 65.[2]

"Normal retirement age" is a pivotal concept. No later than normal retirement age, pension benefits under ERISA must become payable. 29 U.S.C. § 1056(a), App. 22a. It is upon attainment of normal retirement age that an employee's right to his or her normal retirement benefit becomes nonforfeitable. 29 U.S.C. § 1053(a),

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2. There is a statutory exception, not relevant to this case, for employees who have not yet participated in an ERISA plan for five years as of age 65: for those employees, "normal retirement age" is defined as the later of age 65 or the fifth anniversary of the date on which they commenced participation in the plan. This petition generally refers to the core definition without repeating the exception each time, whether in reference to the statute or related regulations.

App. 20a. Normal retirement age is also used to determine ERISA's minimum benefit accrual requirements. 29 U.S.C. § 1054(b)(1)(A), App. 21a.

Key here, "normal retirement age" is also the benchmark from which "early retirement" is measured. "Early retirement" means retirement at any age before normal retirement age. By amending its plan to raise normal retirement age from age 65 to age 67, Thiokol converted retirement at any age before 67 into early retirement, with substantial economic consequences for retirees.

In a typical pension plan, retirement at age 63 (for example) triggers benefit payments beginning at age 63, but in smaller monthly installments than if they began at age 65, to adjust for a pay-out that starts earlier and is expected to last longer—two years earlier and longer when payments begin at age 63 rather than 65. Accordingly, under a plan with a normal retirement age of 65, a worker who retires at age 63 suffers a two-year reduction. Under the amended Thiokol plan, by contrast, where normal retirement age has been raised to age 67, that same 63-year-old now suffers a four-year reduction.

The implications of that increased reduction are substantial. Like most pension plans, Thiokol's plan provides for a reduction of approximately 6.5% for each year for the first several years prior to normal retirement age that an employee retires; hence, as the court of appeals noted, under Thiokol's amended plan an employee retiring at age 65 would now receive only 86.7% of a normal retirement benefit. App. 4a. Retirement at age 63 (which formerly would have had a two-year reduction, but now carries a four-year reduction because of the new "normal" retirement age of 67) causes a reduction of some 26.6% of a retiree's monthly benefit. The higher the normal retirement age is set, the greater the number of workers who will be required to accept a reduced benefit and the greater their reduction in benefits. Full, unreduced benefits become unattainable for workers who are laid off as a result of workforce reductions or plant closings prior to their achieving the new "normal retirement age"—which under the decision below can be a constantly changing, and increasingly distant, target.

Thiokol expects that as a result of its raising the normal retirement age, most of its covered employees will *not* retire with full, unreduced monthly pensions. In its first Form 5500 following the effective date of the amendment to its pension plan, Thiokol reported that only 20% of the covered employees in its work force were expected to work until age 67, the new normal retirement age. (Aplt. App. at 221, 230).[3] Thiokol has raised "normal" retirement age to a level that it assumes only one in five of its employees will ever reach, whether because of layoff, sickness or other causes.

Proceedings in the district court. Petitioners are four[4] Thiokol retirees who retired before age 65, each with more than 33 years of service. As a result of Thiokol's having raised normal retirement age from age 65 to age 67, they receive (as the district court found) "substantially" smaller monthly benefits than each would be receiving if normal retirement age were still age 65.[5] App. 11a, 12a. Petitioners brought suit in federal district court pursuant to ERISA's civil enforcement provision, 29 U.S.C. § 1132, alleging that the establishment of a normal retirement age in excess of 65 violated ERISA.

Petitioners argued in the district court that the plain language of ERISA's statutory definition of "normal retirement age" (and complementary provisions of the statute), the legislative history behind it and applicable agency regulations lead inexorably to the conclusion that pension plans can use normal retirement ages *lower* than age 65 but that no ERISA-covered pension plan can impose a normal retirement age higher than age 65. The district court

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3. "Form 5500's" are the annual "returns" or disclosure statements that ERISA-covered employee benefit plans file with the IRS. The IRS in turn provides a copy to the Department of Labor and certain information from the report to the Pension Benefit Guaranty Corporation. See 29 U.S.C. § 1023; 26 U.S.C. § 6058(a).

4. Petitioners sought to bring this action as a class action. Their class certification motion was fully briefed and argued to the district court at the same time as the parties' cross-motions for summary judgment, but the court never reached the class question.

5. The reduction in monthly benefits caused by the increase of normal retirement age to 67 ranged from some $470 per month for Petitioners Lindsay and Rasmussen down to some $247 per month for Petitioner LaBau. Aplt. App. at 208.

rejected Petitioner's position and entered summary judgment for Respondents, finding that ERISA's definition of normal retirement age in 29 U.S.C. § 1002(24) "is for purposes of the statute" but does *not* limit employers' definitions of normal retirement age in their plan documents. App. at 14a. The district court concluded that as long as "ERISA's specific protections [are] available at age 65" a plan that "defines age 67 as its normal retirement age does not violate § 1002(24)." *Id.* The district court did not discuss or address Congress's purpose in establishing the definition of normal retirement age set forth in § 1002(24) or the ample legislative history discussing this precise question. Neither did it address any agency regulations dealing with the question.

The court of appeals decision. In affirming the district court, the decision below begins by noting that, *"The issue on appeal is one of pure statutory interpretation*: whether ERISA, as a matter of law, prohibits a pension plan from setting a 'normal retirement age' greater than 65 years of age." App. 2a; emphasis added.

The court of appeals concluded that although the definition of normal retirement age in 29 U.S.C. § 1002(24) requires that "the use of the words 'normal retirement age' elsewhere in the ERISA statute can never mean over 65," App. 2a., that limitation does not apply to *pension plan documents*. "Nowhere in the statute," the court of appeals said, "is the plan-declared 'normal retirement age' required to be the same as that defined in the statute for purposes of the statute." App. 3a.[6] The court of appeals stated that "If Congress intended" that plans could define normal retirement ages only earlier than age 65 but not later, "it could have easily said so." App. 2a. Like the district court, the Tenth Circuit did not mention any relevant agency regulations or the statute's legislative history

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6. The court of appeals was clear that its decision did not turn on the face that the higher normal retirement age in question was *67* as opposed to some higher number; rather, in the words of the court, the issue on appeal was "whether ERISA, as a matter of law, prohibits a pension plan from setting a 'normal retirement age' greater than 65 years of age." App. 2a. In the district court, Thiokol was explicit that a normal retirement age of 90, while perhaps impractical, would be legal under the reading of the statute urged by it and accepted by both the district court and the court of apeals. Aplt. App. at 1494.

as reflecting of Congress's intent on the precise point in question. That legislative history expressly states that the normal retirement age in a plan "may not be later than age 65."

REASONS FOR GRANTING THE WRIT

Every ERISA-covered pension plan relies on a definition of "normal retirement age." To workers planning their work careers and their retirement, it is in many ways perhaps the central provision in their pension plan because it is the "normal retirement age" established for their plan that determines when an employee will receive a full, unreduced pension and when the employee will receive only a fractional "early retirement" pension benefit. It is axiomatic that the higher "normal retirement age" is set, the fewer the number of employees who will ever achieve it (and therefore a full pension benefit), and, conversely, the greater the number who must take a reduced "early retirement" benefit. As the case at bar demonstrates, even a seemingly small change in the normal retirement age can effect truly substantial losses in retirement benefits to the employees, here hundreds of dollars per employee per month.[7] The question presented here is at once simple (is there any limit on how high employers can set the normal retirement age?) and profoundly important to a major segment of the population, all the more so as private retirement planning assumes a larger role in every household in America.

The answer to this question affects ERISA pension plans across the country. In the court of appeals Respondents purported to identify some thirty major corporations across the country that have now adopted normal retirement ages in excess of age 65. App. 30a. If the decision below is allowed to stand, the number of employers making similar changes to their plans' normal retirement ages can be expected to increase exponentially, since the fewer employees reaching normal retirement age and receiving full retirement benefits, the less the employers' funding obligations.

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7. See note 5, *supra*.

There are some 45 million workers who are participants in pension plans covered by ERISA.[8] The decision below thus decides a significant point of law with a nationwide impact—and decides it erroneously. This is a question that should be decided now before more retirees and their families are required to live on substantially reduced pensions resulting from the establishment of normal retirement ages in excess of age 65. Any delay in definitively resolving this question will come too late for many retirees and their dependents, and should not be permitted.

The Court should act now to resolve the question rather than wait for further development in the courts below because of the significant (and in many instances irreversible) impact reduced pensions resulting from these increased normal retirement ages will have on workers at a time when they are most vulnerable and in need of the benefits for which they have worked for decades.

The decision below conflicts with the plain language of the statutory definition of "normal retirement age." It ignores and then contradicts an unmistakably clear legislative history addressing "normal retirement age." It fails even to mention the regulatory application of that definition by the agencies charged with administering ERISA, *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984), and is a decision on a key provision of ERISA that is fundamentally at odds with the Fifth and Seventh Circuits' faithful construction of the same statutory definition of "normal retirement age."

The decision below creates confusion where before there was none. There is no longer *any* upper limit on "normal retirement age" under the decision below. Thiokol amended its plan to raise normal retirement age from 65 to 67, but under the decision below, holding that the statutory definition of normal retirement age is not a constraint, employers could now permissibly raise their normal retirement age past age 65 and past age 67 to 77 or 87. The confusion and legal uncertainty produced by the decision below presents a serious impediment to planning, both for plan drafters and plan participants. The Court should grant immediate review to

8. Private Pension Plan Bulletin, Abstract of 1993 Form 5500 Annual Reports, U.S. Dept. of Labor Pension & Welfare Benefits Admin., No. 6, p. 76 (table F-4), Winter 1997.

eliminate the confusion created by the decision below—before increased normal retirement ages in plans across the country result in smaller pension checks for any more workers.

In enacting ERISA, Congress sought to ensure that "the private pension promise become real rather than illusory." H.R. Rep. No. 533, 93d Cong., 2d Sess., reprinted in 1974 U.S.C.C.A.N. 4639, 4648. Few provisions more directly affect that promise than the establishment of a maximum normal retirement age, and few decisions more jeopardize that promise than the decision below, which unsettles a linchpin of the framework built to make the promise real. Under the decision below, employers would be allowed to amend the normal retirement age provision of their plans virtually at will, up to any age, and workers face the realistic possibility of pursuing an ever-distancing goal of a full retirement.

The question presented here has broad and immediate importance for millions of workers and thousands of ERISA pension plans. The dollars involved are huge by almost any measure. The case is a perfect vehicle for review, presenting, in the words of the court below, "a pure question of law." Given the wide importance, the significant impact and the irreversible harm that will result in many instances, the Court should grant the writ and resolve authoritatively the question of whether ERISA in fact provides the protection that Congress said it did when passing the statute.

I. The Decision Below Is Contrary To The Plain Wording And Common Sense Meaning Of The Statute As Well As Congress's Unusually Clear Statement Of Its Intent On The Precise Question At Issue.

The Statute

Congress intended that ERISA-covered benefits plans would have normal retirement ages no later than age 65. The statutory definition of "normal retirement age" says so in plain language, requiring that normal retirement age must be no "later" than "age 65." The plain language controls. Contrary to that plain language, the decision below holds that Congress's definition only applies to "normal retirement age" as those words are used "in the ERISA statute" and nowhere else. App. at 3a. That approach

renders statutory definitions nearly meaningless, as if Congress had defined normal retirement age solely as an aid to reading the ERISA statute without any intention that the definition would apply in the real world—to the ERISA plans that the statute governs and with which the plans must comply. Cf. *Industrial Union Dept., AFL-CIO v. American Petroleum Institute*, 448 U.S. 607, 641 n.45 (1980) ("While it is true that [the section of OSHA] is entitled 'definitions,' that fact does not drain each definition of substantive content. For otherwise there would be no purpose in defining the critical terms of the statute.").

The Tenth Circuit's holding is also expressly and independently foreclosed by ERISA's "coverage" provision. 29 U.S.C. § 1003(a). The definition of "normal retirement age" in ERISA section 3(24), 29 U.S.C. § 1002(24), is followed in the statute by a "coverage" provision, 29 U.S.C. § 1003(a), which expressly provides that:

> "this subchapter [29 U.S.C. §§ 1001-1199] shall apply to any employee benefit *plan* if it is established or maintained *** by any employer engaged in commerce or in any industry affecting commerce; ***." App. 19a; emphasis added.

That leaves no room for the Tenth Circuit's contrary holding that the definition is "for the purposes of the statute" but does not apply to actual employee benefit plans. App. 3a. The *coverage* provision says that the definition "shall apply to any employee benefit plan." 29 U.S.C. § 1003(a). App. 19a. Again, the plain wording of the statute forecloses the interpretation of Section 3(24) imposed by the lower court.

The Legislative History

If there were any ambiguity in the plain language of the statute, the legislative history emphatically resolves it. Rarely is legislative history so uniformly clear as the legislative history in this case, and on the *precise* point in issue. For instance, the clearest evidence of congressional intent, the Joint Explanatory Statement of the House and Senate Conference Committee of the final version of ERISA,[9] which the decision below does not mention or distinguish, could

9. In *National Association of Greeting Card Publishers v. United States Postal Service*, 462 U.S. 810, 833 n. 28, (1983), this Court noted the "great weight" that should be given to conference committee reports. Most

not be plainer or more contrary to the lower court's holding. It says:

> Normal retirement age generally is to be the age specified under the plan. However, *it may not be later than age 65* ***. (Emphasis added).

H.R. Conf. Rep. No. 93-1280, p. 273 (1974), 1974 U.S.C.C.A.N. 5054-55, 3 Legislative History of the Employee Retirement Security Act of 1974, 94th Cong., 2d Sess., 4540 (Comm. Print 1976) (cited hereinafter as "Leg. Hist.").

Congress's reasoning for imposing a ceiling on "normal retirement age" appears equally clearly from the legislative history:

> [T]he committee believes that overly restrictive age and service eligibility requirements can arbitrarily frustrate the effective functioning of the private pension fund. In view of these considerations, the committee has concluded that it is appropriate to specifically limit age and service eligibility requirements which an employer may incorporate in a qualified pension plan.[10]

Courts of Appeal have heeded that instruction. E.g., *Payne v. Federal Land Bank of Columbia*, 916 F.2d 179, 182 (4th Cir. 1990):

> "The part of legislative history which is given the most weight is the conference report. Inasmuch as the conference report represents the final statement of the terms agreed upon by both houses of Congress, next to the statute itself, it is the most persuasive evidence of the Congressional intent behind the enactment of the statute."

Accord RJR Nabisco, Inc. v. U.S., 955 F.2d 1457, 1462 (11th Cir. 1992) ("next to the statute itself [the conference report] is the most persuasive evidence of congressional intent"); *Kuehner v. Heckler*, 778 F.2d 152, 160 (3d Cir. 1985) (the conference report "is the closest we have to an 'official legislative interpretation'. . .").

Contrary to these teachings (specifically called to its attention), the court of appeals here took no account of the Conference Report's statements on the precise point at issue in reaching its contrary conclusion as to the meaning of the statute.

10. H.R. Rep. No. 779, 93rd Cong., 2d Sess., 43 (1974), *reprinted* in 2 Leg. Hist., at 2632 (1976).

The report of the Ways and Means Committee likewise states:

> Normal retirement age is the age specified in the plan, *which may not be later than age 65* ***.

H.R. Rep. No. 807, 93d Cong., 2d Sess. p. 61 (1974), 1974 U.S.C.C.A.N. 4726, 2 Leg. Hist. 3181; emphasis added. See also the remarks of Senator Nelson, 119 Cong. Rec. 30,135 (1973), 2 Leg. Hist. 1720 ("[T]he amendment provides certain further protections with respect to vesting. Under the amendment, for example, there could be no retirement plan with a normal retirement age later than 65.").

Congressional intent is plain: ERISA-covered pension plans may define normal retirement age at age 65, or lower than that, but not higher.

II. The Decision Below Entirely Ignores What *Chevron* Teaches And Conflicts With Regulations Promulgated By The Department Of Labor And The PBGC.

As an exercise in statutory construction, the decision below errs fundamentally. Against the force of the plain language of the statute, the decision declares that ERISA does not address the precise question whether the "plan-declared 'normal retirement age' [is] required to be the same as that defined in the statute for the purposes of the statute." App. 3a. In short, the Tenth Circuit found Congressional silence. That was error, but even so *Chevron U.S.A. v. Natural Resources Defense Council,* 467 U.S. 837, 842-43 (1984), teaches that (in the face of Congressional silence, however wrongly found) the next step should have been to examine whether the agencies charged with administering ERISA have given the statutory term "normal retirement age" a reasonable construction. No such inquiry was undertaken.

The decision below neither distinguishes nor even mentions that both the Pension Benefit Guaranty Corporation ("PBGC") and the Department of Labor ("DOL") have promulgated regulations interpreting the statutory definition of "normal retirement age"—and that those agencies are in agreement, contrary to the

decision in this case, that plan documents may set normal retirement ages no higher than age 65.[11]

The result here is a decision that contradicts agency interpretations as formulated in federal regulations—without so much as mentioning them. It is a result fundamentally at odds with the teachings of this Court. Construing ERISA's "comprehensive and reticulated" provisions, *Nachman v. Pension Benefit Guaranty Corporation*, 446 U.S. 359, 361 (1980), without regard to the views of the DOL and the PBGC is, as the Court has remarked before, like traveling "without a compass," *Mead Corp. v. Tilley*, 490 U.S. 714, 726 (1989); *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984), and it is reversible. See *Nachman*, *supra*, 446 U.S. at 373 ("We surely may not reject this

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11. The IRS, also charged with ERISA oversight functions, has never spoken definitively on "normal retirement age." In the briefing below, Respondents suggested that an example given in 26 C.F.R. § 1.411(a)-7(b) (Example 2) could be read as implicit IRS approval of normal retirement ages above age 65 by virtue of the fact that the example refers to a hypothetical plan under which retirement before age 70 is subject to an early retirement reduction. (The relevant portions of that regulation are reprinted, *infra*, at App. 27a.) Petitioners dispute that this is a correct inference to draw, but, whatever inference is drawn, it is plain that an inference from an unexplained reference cannot be taken as a reliable statement of agency position.

Petitioners believe that a more relevant indication of the IRS's position came recently when the IRS directly addressed the precise issue in this case—whether a normal retirement age of 67 is permissible—although, admittedly, it answered that question outside of the regulatory rulemaking process. In a May 1996 joint meeting with the ABA Committee On Employee Benefits, the IRS stated that normal retirement ages above age 65 are not permissible. As part of an annual process, the ABA Committee met with the IRS to solicit its views on various issues, and put forward the question "Can an employer amend its plan to change the definition of normal retirement age from 65 to 67 so long as there is no violation of [ERISA] § 204(g)?" The ABA proposed that the answer to that question ought to be: "No, normal retirement age must be defined at age 65 (or 5 years after an employee begins working) for all purposes including receipt of a full unreduced benefit amount. . . ." *The IRS agreed:* "The IRS agrees with the proposed answer.***" This published Question and Answer are reproduced, *infra*, at App. 29a.

contemporary construction of the statute by the PBGC without a careful examination [of the statute] and its underlying history").

The PBGC. The explicit position of the PBGC is that "Normal retirement age means the age specified in the plan" and "[t]his age *shall not exceed *** age 65 ****," 29 C.F.R. § 4001.2 (1996). App. 26a. That has been the consistent position of the PBGC for years, including at the time Thiokol amended its plan. See, e.g., 29 C.F.R. § 2613.2 (1990-1995) (" 'Normal retirement age' means the age specified in the plan *** which age *** *cannot exceed* *** *age 65*") (App. 24a); 29 C.F.R. § 2619.2 (1990-1995) (" 'Normal retirement age' means the age specified in the plan *** This age shall not exceed *** age 65."). (App. 25a). The Tenth Circuit's holding that age 65 applies "for the purposes of the statute" but not for purposes of actual plans cannot be reconciled with these PBGC regulations. The regulations specifically delimit "the age specified *in the plan*."

The DOL. The Department of Labor expressly requires employers to define normal retirement age in their plan documents "as that term is defined in section 3(24) of the Act." 29 C.F.R. § 2520.102-3(j)(1) (1996). App. 23a. ERISA requires the distribution of "summary plan descriptions" (SPDs) to plan participants, outlining the basic provisions of a plan, and the DOL regulation governing the content of these SPDs, explicitly states that the SPD:

> shall ... include a statement describing the *plan's* normal retirement age, *as that term is defined in section 3(24) of the Act* . . . . (Emphasis added).

This regulation reflects the DOL's position that it is "*the plan's* normal retirement age" that is defined in ERISA section 3(24), 29 U.S.C. § 1002(24).

III. The Decision Below Departs From At Least Two Other Circuits' Interpretation Of The Same Statutory Definition Of "Normal Retirement Age."

The Tenth Circuit's decision in this case produces two rules: (1) the statutory definition of normal retirement age will now apply only when plan documents do not specify any age at all for normal

retirement age (i.e., it will function solely as a default provision); and (2) so long as the structure of a plan otherwise complies with ERISA, normal retirement ages can be set at any higher age, whether 67 or 87.

Both propositions are inconsistent with the decisions of the Fifth and Seventh Circuits interpreting the same statutory definition of "normal retirement age."

1. In *Johnson v. Franco,* 727 F.2d 442 (5th Cir. 1984), the Fifth Circuit held that "normal retirement age" is a "statutorily prescribed" "requirement," the definition of which necessarily must follow from the statute, not the structure of the plan. *Id.*, 727 F.2d at 443-45.[12] The Tenth Circuit's opinion in this case, allowing an employer to define normal retirement age as it pleases so long as the "substance" of the rest of its plan complies with ERISA, App. 8a, is inconsistent with the Fifth Circuit's approach.

2. In *Janowski v. Teamsters Local 710,* 673 F.2d 931 (7th Cir. 1981), the Seventh Circuit (a) applied the mirror-image definitions of "normal retirement age" provided in ERISA and the Internal Revenue Code to plan documents, and (b) stated that the normal retirement ages in pension plan documents,

> may be lower than 65 but *not* greater than 65.

Janowski, 673 F.2d at 937 (emphasis added). The Tenth Circuit's opinion in this case departs from *Janowski* on both these points.[13]

12. Congress's "intended meaning of 'normal retirement age' " was the "central" issue in *Johnson v. Franco,* 727 F.2d at 433, as it is in this case. The Fifth Circuit held that the normal retirement age under the plan in that case was age 65, regardless of whether the plaintiff's rights to normal retirement benefits under the plan may have vested sooner than that, 727 F.2d at 445, and noted in reaching that conclusion that the normal retirement age under a plan must be derived from the "statutorily intended meaning provided by ERISA's own definitions section," 727 F.2d at 443, not (as the district court had held in that case) "the substance of the plan's provision for retirement benefits." 727 F.2d at 445. *Id.*

13. *Janowski* was an action by a plaintiff challenging a plan amendment that had raised "normal retirement age" from age 57 to age 65, but not beyond (as here). The Seventh Circuit upheld the plan amendment because the amended normal retirement age was within the statutory definition provided by the statute.

See also *Hlinka v. Bethlehem Steel Corp.*, 863 F.2d 279, 280 & n.3 (3rd Cir. 1988) ("The statutory language of ERISA . . . stipulate[s] that the age of 'normal retirement is sixty-five . . . .' Normal retirement age is 65 . . . unless the plan specifies an earlier date. 29 U.S.C. § 1002(24)").

The decision below rejects two essential premises accepted by both the Fifth and Seventh Circuits: (1) that the statutory definition of "normal retirement age" governs plan documents and is not solely "for purposes of the statute," and (2) that, pursuant to that statutory definition, age 65 is the maximum permissible normal retirement age an employer may set in plan documents. There is now confusion about the meaning of normal retirement age where previously there was none, and on a nationwide scale: every ERISA-covered pension plan relies on a definition of normal retirement age. Disagreements about the meaning or force of that definition (even in principle) make planning, both for plan drafters and plan participants, risky and uncertain. Retirement planning is difficult enough without added uncertainties. Delayed resolution will come too late for many retirees. The Court should grant certiorari now to eliminate the confusion created by the decision below.

CONCLUSION

For the foregoing reasons, petitioners urge the Court to grant certiorari in this case.

DATED: July 17, 1997

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

GRANT T. LINDSAY, F. BRUCE STEVENS, RUSSELL M. RASMUSSEN, THOMAS C. LABAU, individually and on behalf of a class of similarly situated individuals,
Plaintiffs-Appellants,

v.

THIOKOL CORPORATION and THIOKOL CORPORATION PENSION PLAN,
Defendants-Appellees.
No. 96-4033.

Appeal from the United States District Court
For the District of Utah, Northern Division
D.C. No. 94 NC 174

Jonah Orlofsky of Plotkin & Lacobs, Ltd., Chicago, Illinois, for Plaintiffs-Appellants.

Mary Anne Q. Wood of Wood, Quinn & Crapo, L.C., Salt Lake City, Utah, for Defendants-Appellees.

Before HENRY, MURPHY, and RONEY* , Circuit Judges.

RONEY, Senior Circuit Judge.

Thiokol Corporation amended its pension plan to change the definition of "normal retirement age" from the age of 65 to 67. Several former employees, who took early retirement and who would be receiving greater benefits had the plan not been changed, sued under ERISA, claiming a violation of four separate provisions of the Act. The district court entered summary judgment for Thiokol on the ground that Thiokol's amended plan satisfied ERISA because it met the ERISA benefit protection requirements for employees reaching ERISA's definition of "normal retirement age." We affirm.

* The Honorable Paul H. Roney, Senior Circuit Judge for the Eleventh Circuit, sitting by designation.

The issue on this appeal is one of pure statutory interpretation: whether ERISA, as a matter of law, prohibits a pension plan from setting a "normal retirement age" greater than 65 years of age.

Plaintiffs brought suit under the ERISA civil enforcement mechanism, 29 U.S.C. § 1132, claiming Thiokol's plan violated four separate ERISA provisions: 29 U.S.C. § 1002(24), which defines "normal retirement age" (Count I); 29 U.S.C. § 1053(a), which requires that "normal retirement benefits" be unforfeitable upon reaching normal retirement age (Count II); 29 U.S.C. § 1056(a), which requires that benefits payments begin upon the plan participant reaching normal retirement age (Count III); and 29 U.S.C. § 1054(b), which requires that the accrued benefit payable at normal retirement age be equal to the normal retirement benefit (Count IV).

The first count, the crux of the controversy, arises from the effect ERISA's definition of "normal retirement age," which does make 65 years of age the outside limit for anyone who has participated in a pension plan more than five years by age 65:

> The term "normal retirement age" means the earlier of—
>
> (A) the time a plan participant attains normal retirement age under the plan, or
>
> (B) the later of—
>
> (i) the time a plan participant attains 65, or
>
> (ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24). This definition sets the age at which certain benefits outlined elsewhere in ERISA must vest as the earlier of two ages: (a) any age earlier than 65 a particular plan has declared as its "normal retirement age," and (B) a maximum age of 65, except for late-joining participants. Under this definition, the use of the words "normal retirement age" elsewhere in the ERISA statute can never mean over 65 for employees who have participated in the plan for at least five years.

Plaintiffs seem to argue that 29 U.S.C. § 1002(24) permits the plan to define "normal retirement age" only earlier than 65, not later. If Congress had intended this, it could have easily said so.

There is no support for the argument that the statute should be judicially rewritten to make this modification. See *Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 495 n. 13 (1985) ("[C]ongressional silence, no matter how 'clanging,' cannot override the words of the statute."). The exceptions to our obligation to interpret a statute according to its plain language are "few and far between." *Resolution Trust Corp. v. Westgate Partners, Ltd.*, 937 F.2d 526, 529 (10th Cir.1991) (citing three exceptions: (1) "rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intention of its drafters," *United States v. Ron Pair Enters.*, 489 U.S. 235, 242 (1989); (2) "if such an interpretation would lead to 'patently absurd consequences,'" *United States v. Brown*, 333 U.S. 18, 27 (1948); and (3) "when two provisions whose meanings, if examined individually, are clear, but whose meanings, when read together, conflict, it is up to the court to interpret the provisions so that they make sense," *Love v. Thomas*, 858 F.2d 1347, 1354 (9th Cir. 1988), *cert. denied sub nom., AFL-CIO v. Love*, 490 U.S. 1035 (1989)).

Nowhere in the statute is the plan-declared "normal retirement age" required to be the same as that defined in the statute for the purposes of the statute. See *Johnson v. Franco*, 727 F.2d 442, 443-45 (5th Cir.1984) ("[T]he statutorily intended meaning of 'normal retirement age' is provided by ERISA's own definitions section, which defines the meaning of terms used for purposes of that statute.").

Having defined "normal retirement age," the statute then goes on to set forth certain requirements that must be met by a plan for employees reaching normal retirement age as defined by the statute. If those requirements are met by the plan, then there has been no violation of the statute by the amended plan. It appears clear that Thiokol has established age 67 as the benchmark in its pension plan from which benefits for all employees are determined, but has maintained the age-65 benefit accrual and vesting requirements of ERISA.

Thiokol's pension plan is considered a defined benefit plan under ERISA. 29 U.S.C. § 1002(35). An "accrued benefit" in a defined benefit plan is a participant's "accrued benefit determined under the plan . . . and expressed in the form of an annual benefit, starting at

normal retirement age," 29 U.S.C. § 1002(23)(A), or the actuarial equivalent of such a benefit, 29 U.S.C. § 1054(c)(3).

In addition to the terminology dispute surrounding normal retirement age, Thiokol's plan has engendered controversy with its use of the term "accrued benefit." The plan provides

> 7.1 *Eligibility.* A participant whose employment . . . terminates on or after he has attained age 55 with five years of Vesting Service but before his Normal Retirement Age shall be eligible to receive an Early Retirement Benefit under the Plan. . . .
>
> 7.2 *Amount.* Except as otherwise provided in this Plan document, the amount of the monthly benefit payable to a participant under section 7.1 shall be equal to—
>
> (a) *the Participant's Accrued Benefit, reduced by* [the following formula].

Thiokol Plan, Article VII ("Early Retirement Benefits") (emphasis added). Under the formula set forth in the remainder of section 7.2 of Thiokol's plan, an employee retiring at age 65 receives 86.7% of what the plan calculates as the "accrued benefit." See Summary Plan Description Distributed to Thiokol Employees in Mid-January 1991 at 11 (applying the section 7.2 formula to calculate the percentage of pension available at each retirement age from 55 to 67, ranging from 43.4% to 100%). We dismiss the "accrued benefit" controversy for much the same reason that we approve Thiokol's declaration of age 67 as normal retirement age. Regardless that the 65-year-old retiree's benefit is 86.7% of some other quantity, the 65-year-old's entitlement to that plan-defined retirement benefit is afforded the full protection required by ERISA.

Relevant to the accrual and vesting issues in this dispute, ERISA provides in part:

> (1) All accrued benefits are protected from reduction by a plan amendment, whether or not they are vested (nonforfeitable). 29 U.S.C. § 1053(c).
>
> (2) A defined benefit plan must determine a participant's accrued benefit by a specified method that satisfies at least one of three alternatives. 26 U.S.C. § 411(b)(1)(A); 29 U.S.C. § 1054(b)(1)(A).

(3) A plan must provide that a participant's accrued benefit vests (becomes nonforfeitable) at specified rates. 29 U.S.C. § 1053(a).

(4) An employee must be fully vested in his accrued benefit at the plan's normal retirement age. 29 U.S.C. § 1053(a).

(5) A participant's right to the accrued benefit derived from his own contribution must be nonforfeitable at all times. 29 U.S.C. § 1053(a)(1).

(6) A pension plan must guarantee an employee's right to the highest pension benefit the employee has earned through their service, whether they earned that benefit at age 65 or younger. 29 U.S.C. § 1053.

(7) Payment of benefits must commence within 60 days of the latest of the plan year in which the participant: turns 65, celebrates his tenth anniversary of participation, or terminates service. 29 U.S.C. § 1056(a).

(8) Accrued pension benefits may not be waived in the later years of service. 29 U.S.C. § 1054.

There is no dispute that Thiokol's plan fulfills those benefits for persons who reach 65 years of age, even though that is two years prior to the plan's declared age for normal retirement. Thus, once an employee reaches the age of 65, the benefits required by ERISA are preserved.

Plaintiffs receive less under the new plan than they would have under the old plan in part due to the elimination of the opportunity to accrue early retirement subsidies. An early retirement benefit would normally consist of the benefit the employee has accrued at the early retirement age and would be entitled to begin receiving at age 65, actuarially reduced to reflect the fact that the plan must pay the employee this benefit over a longer period of time. Thiokol's old plan softened the impact of this actuarial reduction for early retirees by including a subsidy to raise the amount of the early retirement benefit. These subsidies accrued to the employees at specified rates. The new plan eliminates the further accrual of early retirement subsidies.

Thiokol may not eliminate accrued benefits by plan amendment. 29 U.S.C. § 1053(a). With the 1983 Retirement Equality Act, Congress amended ERISA "to make clear that 'a plan may not be

amended to eliminate or reduce an early retirement benefit or a retirement-type subsidy with respect to benefits attributable to service before the amendment.' " *Ahng v. Allsteel, Inc.*, 96 F.3d 1033, 1036 (7th Cir.1996) (quoting John H. Langbein & Bruce A. Wolk, *Pension and Employee Benefit Law*, 142-43 (2d ed.1995) (discussing 29 U.S.C. § 1054(g))). Thiokol's plan complies with 29 U.S.C. § 1054(g) because it preserves all early retirement benefits, including subsidies, that accrued prior to the effective date of the amendment.

Plaintiffs' sharp focus on ERISA's terms does not disclose a violation of the accrual and vesting requirements. Count II alleges a violation of 29 U.S.C. § 1053(a), which provides:

> Each pension plan shall provide that an employee's right to his *normal retirement benefit* is nonforfeitable upon the attainment of normal retirement age. . . .

(emphasis added). ERISA defines "normal retirement benefit" as

> the greater of the *early retirement benefit* under the plan, or the benefit under the plan commencing at normal retirement age.

29 U.S.C. § 1002(22) (emphasis added). Though used several times in the ERISA statute, "early retirement benefit" is never specifically defined. We construe the term in the specific context it appears. The statutory definition of nonforfeitable applies only to a benefit "which arises from a participant's service." 29 U.S.C. § 1002(19). Accordingly, where, as here, the normal retirement age under the plan is not less than 65 years, we read 29 U.S.C. § 1053(a) to state:

> Each pension plan shall provide that an employee's right to [the greater of (1) any pre-age 65 retirement benefit under the plan and (2) the age 65 benefit under the plan] is nonforfeitable upon the attainment of normal retirement age. . . .

The ERISA normal retirement age for the plaintiffs here, who all participated in the plan well beyond five years, was 65. For them, 29 U.S.C. § 1053(a) requires that

> [the Thiokol] plan shall provide that an employee's right to [the greater of (1) any pre-age 65 retirement benefit under the plan and (2) the age 65 benefit under the plan] is nonforfeitable upon the attainment of [age 65].

The Thiokol plan so provides.

Count III alleges a violation of 29 U.S.C. § 1056(a), which provides that

> [e]ach pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest the close of the plan year in which
>
> > (1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan. . . .

Plaintiffs argue that this provision requires payment of the age 67 benefit under Thiokol's plan at age 65. This provision does state that payments begin at age 65, but does not specify the amount. That is because the amount is otherwise controlled by ERISA. The Thiokol plan does begin paying benefits at age 65—the age 65 benefits under the Thiokol plan. That satisfies the statute.

Plaintiffs' last count fails on its face based on the foregoing holdings. Count IV alleged that Thiokol's plan violates 29 U.S.C. § 1054(b)(1)(B), which provides:

> A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at normal retirement age is equal to the normal retirement benefit . . .

Building on our above construction of 29 U.S.C. § 1053, under Thiokol's plan we construe 29 U.S.C. § 1054(b)(1)(B) to read:

> A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at [age 65] is equal to [the benefit under the plan commencing at age 65.]

We agree with the district court that sections 5.1(a), 6.2, and 4.2 of Thiokol's plan satisfy this requirement.

Plaintiffs do not dispute that the substance of Thiokol's plan could satisfy ERISA with only a change in terminology. Where the dictates of a statute regulating verbally defined benefits can be satisfied by various terms, there is no rational basis for a court to read into the statute a requirement of the use of specific words absent an express provision in the statute governing terminology.

AFFIRMED.

APPENDIX B

United States District Court
Northern Division for the District of Utah

Grant T. Lindsay, et al.,

v.

Thiokol Corp et al.,

JUDGMENT IN A CIVIL CASE

Case Number 1:94cv174C

IT IS ORDERED AND ADJUDGED

This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

It is ordered that:

judgment be entered in favor of the defendants and that plaintiffs' cause of action is dismissed.

January 29, 1996

Markus B. Zimmer
Clerk

/s/ Louise Saltus York
(By) Deputy Clerk

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF UTAH
NORTHERN DIVISION

GRANT T. LINDSAY, et al.,
Plaintiffs

vs.

THIOKOL CORPORATION and THOKOL CORPORATION PENSION PLAN,
Defendants.

MEMORANDUM DECISION AND ORDER

Civil No. 1:94-NC-174C

This matter is before the court on four related motions: (1) defendants' motion to dismiss for lack of standing or, in the alternative, for partial summary judgment; (2) plaintiffs' motion for summary judgment on liability counts I, II, III, and IV; (3) defendants' motion for summary judgment on the merits; and (4) plaintiffs' motion for class certification. The court has jurisdiction over this action pursuant to 29 U.S.C. § 1132(e) and 28 U.S.C. § 1331.

The court heard oral argument on December 1, 1995. At the hearing the plaintiffs were represented by Allen K. Young and Jonah Orlofsky; defendants were represented by Mary Anne Q. Wood and Kathryn O. Balmforth.

The court has considered the memoranda and other materials submitted by the parties and now, being fully advised, the court enters the following memorandum decision and order.

I. BACKGROUND

In June of 1990, defendants Thiokol Corporation and Thiokol Corporation Pension Plan (Thiokol), amended its existing pension

plan.[1] The Old Plan defined normal retirement age as 65. The New Plan changed the definition of normal retirement age to 67.

The four plaintiffs, Grant T. Lindsay, F. Bruce Stevens, Russell M. Rasmussen and Thomas C. Labau, are retired employees of defendant Thiokol; each retired before the age of 65. Had the Old Plan remained in effect, the four plaintiffs would each be receiving a larger monthly benefit. If the New Plan remained the same in all respects except that the normal retirement age was changed from 67 to 65, the four plaintiffs would each be receiving a larger monthly benefit.

Under the Old Plan, early retirees (those retiring before age 65) received the actuarial equivalent of their accrued benefit and an early retirement subsidy from Thiokol. Early retirees under the New Plan receive the actuarial equivalent of their earned benefit, but the additional subsidy has been discontinued.

In August of 1990, meetings were held for Thiokol employees participating in the Old Plan. At these meetings, the plan changes were presented by a specially prepared video, overhead transparencies, and question and answer sessions. Employees were invited to request calculation projecting the effeet of the New Plan on their individual benefit. Also in August of 1990, Thiokol gave its employees a packet of information containing a brochure, "A Strategy for Tomorrow." With this brochure, Thiokol distributed an enrollment form for death and disability benefits which employees were required to return. By verifying that all employees returned their enrollment forms, Thiokol could also verify that all employees had received the brochure. The four plaintiffs returned their death and disability enrollment forms. The brochure described the significant changes from the Old Plan to the New Plan including the formula for calculating the unreduced benefit, the fact that with the New Plan the age at which employees would receive an unreduced benefit had been raised from 65 to 67, and that there was no longer a company subsidy of early retirement benefits. The brochure also informed participants that if they had questions about

1. The parties have referred to the form the pension plan was in before the amendment as the "Old Plan." The plan as it existed after the amendment is referred to as the "New Plan."

the changes, they should address them to their supervisor or to the local Human Resources Department.

On June 21, 1990, a three-page document, including a graph, entitled "Compensation Committee Summary of Recommendations Thiokol Corporation Pension Plan," was presented to the Thiokol Board of Directors. The document set forth the main features of the proposed amendment to the Old Plan. The signed minutes of the Board of Directors' meeting reflect that the Board of Directors adopted the amendment as presented in the written document.

Sections 15.1, 15.2, and 15.3 of the Old Plan give Thiokol the right to amend its pension plan, and that such amendments be in writing, "signed by a duly authorized officer or officers of the company certifying that said amendment has been authorized by the Board of Directors." § 15.3

II. DISCUSSION

A. *Plaintiffs' Standing To Bring The Lawsuit*

Thiokol contends that plaintiffs have not suffered injury resulting from the claims of their lawsuit. Plaintiffs respond that if the Thiokol pension plan had not been amended at all, each of the plaintiffs would have received a substantially higher pension. In addition, plaintiffs argue that if the plan had been amended except that the normal retirement age had been left at 65, again all plaintiffs would be receiving a substantially larger benefit. The court agrees with plaintiffs' arguments and therefore finds that plaintiffs have standing to bring their claims.

B. *Normal Retirement Age*

The first four counts of the complaint allege violations of various provisions of ERISA relating to normal retirement age. According to the plaintiffs, when Thiokol changed the age of normal retirement from 65 to 67, this action violated ERISA. Plaintiffs' motion for summary judgment on liability counts I, II, II and IV is based on this theory.

Thiokol responds that the New Plan complies with ERISA's guarantees that at age 65 participants: (1) have a nonforfeitable right to their benefits; (2) will receive payment of their accrued benefit; (3) will receive the full amount of their accrued benefit or,

if the participant had at some point qualified for a higher benefit, the participant will receive that higher benefit. Thiokol's motion for summary judgment on counts I, II, III, and IV is predicated on its position that because the New Plan fulfills these conditions at age 65, the New Plan's use of age 67 as its normal retirement age does not violate ERISA. The court agrees with Thiokol.

(1) NONFORFEITABILITY AT AGE 65

It is helpful to begin the discussion with count II of the complaint. In this count, plaintiffs contend that the New Plan violates 29 U.S.C. § 1053(a) which states in relevant part: "Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age. . . ." Plaintiffs contend that this provision requires that a pension plan must provide its *best benefit* at age 65. According to plaintiffs, because the New Plan provides its best benefit at age 67, the statute is violated.

"Normal retirement benefit" is defined in 29 U.S.C. § 1002(22) as "the greater of the early retirement benefit under the plan, or the benefit commencing at normal retirement age." The court disagrees with plaintiffs' interpretation of § 1053 as requiring that "the benefit commencing at normal retirement age," that is, age 65, must be the best benefit under the plan. The reference to "early retirement benefit" in the definition of "normal retirement benefit" protects those participants whose salaries were reduced in the years before reaching age 65. Sections 5.1(a) and 4.2(c) of the New Plan fulfill the requirements of 29 U.S.C. § 1053(a).

(2) COMMENCEMENT OF BENEFITS AT AGE 65

Count III alleges that the New Plan violates 29 U.S.C. § 1056(a) which states in part:

> Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which. . . .
>
> (1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan. . . .

Plaintiffs again rely on their best benefit argument to support count III. According to plaintiffs, because a participant receives a reduced benefit at age 65 under the New Plan, the New Plan violates § 1056(a). However, for the reasons set forth above, the court disagrees with plaintiffs' view that the best benefit must be available at age 65. The court finds that § 12.4 of the New Plan meets the requirement of 29 U.S.C. § 1056(a).

(3) THE ACCRUED BENEFIT PAYABLE AT NORMAL RETIREMENT AGE

Count IV alleges violation of 29 U.S.C. § 1054(b)(1)(B) which states in part: "A defined benefit plan satisfies the requirements of this paragraph of a particular plan year if under the plan the accrued benefit payable at the normal retirement age is equal to the normal retirement benefit. . . ."

Plaintiffs claim that the New Plan violates § 1054 because the accrued benefit payable at normal retirement age is not the best benefit. Again, plaintiffs' argument rests on their theory that the best benefit under a plan must be available at age 65, a theory the court does not accept. Sections 5.1(a), 6.2, and 4.2(c) of the New Plan fulfill the requirements of the statute.

(4) ERISA'S DEFINITION OF NORMAL RETIREMENT AGE

29 U.S.C. § 1002(24) defines normal retirement age as "the earlier of (A) the time a plan participant attains normal retirement age under the plan, or (B) the later of (i) the time a plan participant attains age 65, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan." In count I of the complaint plaintiffs allege violation of this provision.

The court finds that the definition in § 1002(24) is for purposes of the statute and requires only that ERISA's specific protections be available at age 65. Because, as discussed above, the New Plan does make those protections available at age 65, the fact that the New Plan defines age 67 as normal retirement age does not violate § 1002(24).

C. *Alleged Procedural Violations*

Count V is based on Thiokol's alleged failure to give notice to plan participants as required by ERISA. Count VI alleges that

Thiokol failed to timely prepare a writing of the New Plan and failed to follow proper amendment procedures. Thiokol has moved for summary judgment on these two counts. For the reasons set forth below the court finds that Thiokol complied with these notice and procedural requirements.

(1) THE NOTICE REQUIREMENT

29 U.S.C. § 1054(h)(1) states in relevant part:

> A plan . . . may not be amended so as to provide for a significant reduction in the rate of future benefit accrual, unless, after adoption of the plan amendment and not less than 15 days before the effective date of the plan amendment, the plan administrator provides a written notice, setting forth the plan amendment and its effective date, to . . . (A) each participant in the plan.

For purposes of the motion, Thiokol agreed that the amendments were "a significant reduction in the rate of future benefit accrual." It is undisputed that Thiokol gave timely notice of the amendment; the issue is whether the notice given was sufficient to fulfill the requirements of the statute. The court finds that Thiokol's methods were sufficient. The meetings for all employees, the question and answer sessions, the invitation to receive individualized calculations, and, most importantly, the brochure "A Strategy for Tomorrow," satisfied Thiokol's notice obligations under the statute.

(2) THE WRITTEN INSTRUMENT AND AMENDMENT PROCEDURE

In the final count of the complaint, count VI, plaintiffs allege that Thiokol violated 29 U.S.C. §§ 1102(1) and 1104(a)(1)(D).

Section 1102(1) states that: "Every employee benefit plan shall be established and maintained pursuant to a written instrument." Section 1104(a)(1)(D) provides that "a fiduciary shall discharge his duties with respect to a plan. . . (D) in accordance with the documents and instruments governing the plan. . . ." According to plaintiffs, the writings that existed on the effective date of the New Plan were not sufficient to comply with the written instrument requirement. The court disagrees and finds that Thiokol complied with the statutes.

In addition to the allegation that Thiokol violated the written instrument requirement of ERISA, plaintiffs claim that defendants failed to comply with the Thiokol pension plan's own provisions for amendment. However, the court finds that Thiokol met the necessary amendment procedures.

III. ORDER

Accordingly, based on the foregoing, and good cause appearing, IT IS HEREBY ORDERED as follows: [2]

1. Defendants' motion to dismiss, or in the alternative, for partial summary judgment on plaintiffs' alleged lack of standing is DENIED;

2. Plaintiffs' motion for summary judgment on liability counts I, II, III, and IV is DENIED;

3. Thiokol's motion for summary judgment on the merits on counts I, II, III, IV, V, VI is GRANTED; and

4. This order will suffice as the court's order and decision on these motions and counsel need not prepare any further orders.

DATED this 4 day of January, 1996.

BY THE COURT

/s/ Tena Campbell
TENA CAMPBELL
United States District Judge

2. In view of the court's order granting defendants' motion for summary judgment, the court need not and does not reach the issue of plaintiffs' motion to certify the lawsuit as a class action and other claims asserted by the parties.

APPENDIX D

26 U.S.C. § 411(a)(8)

§ 411. Minimum vesting standards

. . .

(8) Normal retirement age.—For purposes of this section, the term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1002(24)

§ 1002. Definitions

For purposes of this subchapter:

. . .

(24) The term "normal retirement age" means the earlier of—

(A) the time a plan participant attains normal retirement age under the plan, or

(B) the later of—

(i) the time a plan participant attains age 65, or

(ii) the 5th anniversary of the time a plan participant commenced participation in the plan.

29 U.S.C. § 1003(a)

§ 1003. Coverage

(a) Except as provided in subsection (b) of this section and in sections 1051, 1081, and 1101 of this title, this subchapter shall apply to any employee benefit plan if it is established or maintained—

(1) by any employer engaged in commerce or in any industry or activity affecting commerce; or

(2) by any employee organization or organizations representing employees engaged in commerce or in any industry or activity affecting commerce; or

(3) by both.

29 U.S.C. § 1053(a)

§ 1053. Minimum vesting standards

(a) Nonforfeitability requirements

Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection.

(1) A plan satisfies the requirements of this paragraph if an employee's rights in his accrued benefit derived from his own contributions are nonforfeitable.

(2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A) or (B).

(A) A plan satisfies the requirements of this subparagraph if an employee who has completed at least 5 years of service has a nonforfeitable right to 100 percent of the employee's accrued benefit derived from employer contributions.

(B) A plan satisfies the requirements of this subparagraph if an employee has a nonforfeitable right to a percentage of the employee's accrued benefit derived from employer contributions determined under the following table:

Years of service:	The nonforfeitable percentage is:
3	20
4	40
5	60
6	80
7 or more	100.

. . . .

29 U.S.C. § 1054(b)(1)(A)

§ 1054. Benefit accrual requirements

. . .

(b) Enumeration of plan requirements

(1)(A) A defined benefit plan satisfies the requirements of this paragraph if the accrued benefit to which each participant is entitled upon his separation from the service is not less than—

(i) 3 percent of the normal retirement benefit to which he would be entitled at the normal retirement age if he commenced participation at the earliest possible entry age under the plan and served continuously until the earlier of age 65 or the normal retirement age specified under the plan, multiplied by

(ii) the number of years (not in excess of 33 1/3) of his participation in the plan.

In the case of a plan providing retirement benefits based on compensation during any period, the normal retirement benefit to which a participant would be entitled shall be determined as if he continued to earn annually the average rate of compensation which he earned during consecutive years of service, not in excess of 10, for which his compensation was the highest. For purposes of this subparagraph, social security benefits and all other relevant factors used to compute benefits shall be treated as remaining constant as of the current year for all years after such current year.

29 U.S.C. § 1056(a)

§ 1056. Form and payment of benefits

(a) Commencement date for payment of benefits

Each pension plan shall provide that unless the participant otherwise elects, the payment of benefits under the plan to the participant shall begin not later than the 60th day after the latest of the close of the plan year in which—

(1) occurs the date on which the participant attains the earlier of age 65 or the normal retirement age specified under the plan,

(2) occurs the 10th anniversary of the year in which the participant commenced participation in the plan, or

(3) the participant terminates his service with the employer.

In the case of a plan which provides for the payment of an early retirement benefit, such plan shall provide that a participant who satisfied the service requirements for such early retirement benefit, but separated from the service (with any nonforfeitable right to an accrued benefit) before satisfying the age requirement for such early retirement benefit, is entitled upon satisfaction of such age requirement to receive a benefit not less than the benefit to which he would be entitled at the normal retirement age, actuarially reduced under regulations prescribed by the Secretary of the Treasury.

APPENDIX E

29 C.F.R. § 2520.102-3(j) (1996)

§ 2520.102-3 Contents of summary plan description.

Section 102 of the Act specifies information that must be included in the summary plan description. The summary plan description must accurately reflect the contents of the plans as of the date not earlier than 120 days prior to the date such summary plan description is disclosed. The following information shall be included in the summary plan description of both employee welfare benefit plans and employee pension benefit plans, except as stated otherwise in paragraph (j) through (n):

. . .

(j) The plan's requirements respecting eligibility for participation and for benefits. The summary plan description shall describe the plan's provisions relating to eligibility to participate in the plan, such as age or years of service requirements, and the items listed in paragraphs (j)(l) or (2) of this section as appropriate:

(1) For employee pension benefit plans, it shall also include a statement describing the plan's normal retirement age, as that term is defined in section 3(24) of the Act, and a statement describing any other conditions which must be met before a participant will be eligible to receive benefits. Such plan benefits shall be described or summarized.

(2) For employee welfare benefit plans, it shall also include a statement of the conditions pertaining to eligibility to receive benefits, and a description or summary of the benefits. In the case of a welfare plan providing extensive schedules of benefits (a mdeical care plan, for example), only a general description is required if reference is made to detailed schedules of benefits which are available without cost to any participant or beneficiary who so requests;

. . . .

29 C.F.R. § 2613.2 (1990-1995)

§ 2613.2 Definitions.

For the purposes of this part (unless otherwise required by the context):

. . . .

"Normal retirement age" means the age specified in the plan as the normal retirement age, which age with respect to each participant cannot exceed the later of age 65 or the age attained after 10 years of participation in the plan or, if no normal retirement age is specified in the plan, age 65.

. . . .

29 C.F.R. § 2619.2 (1990-1995)

§ 2619.2 Definitions.

For the purposes of this part (unless otherwise required by the context):

. . . .

"Normal retirement age" means the age specified in the plan as the normal retirement age. This age shall not exceed the later of age 65 or the age attained after 10 years of participation in the plan. If no normal retirement age is specified in the plan, it is age 65.

. . . .

29 C.F.R. § 4001.2 (1996)

§ 4001.2 Definitions.

For purposes of this chapter (unless otherwise indicated or required by the context):

. . . .

Normal retirement age means the age specified in the plan as the normal retirement age. This age shall not exceed the later of age 65 or the age attained after 5 years of participation in the plan. If no normal retirement age is specified in the plan, it is age 65.

. . . .

APPENDIX F

26 C.F.R. § 1.411(a)-7(b) (1996)

(b) Normal retirement age-

(1) General rule. For the purposes of section 411 and the regulations thereunder, the term "normal retirement age" means the earlier of-

(i) The time specified by a plan at which a plan participant attains normal retirement age, or

(ii) The later of-

(A) The time the plan participant attains age 65, or

(B) The 10th anniversary of the date the plan participant commences participation in the plan.

If a plan, or the employer sponsoring the plan, imposes a requirement that an employee retire upon reaching a certain age, the normal retirement age may not exceed that mandatory retirement age. The preceding sentence will apply if the employer consistently enforces a mandatory retirement age rule, whether or not set forth in the plan or any related document. For purposes of subdivision (i) of this subparagraph, if an age is not specified by a plan as the normal retirement age then the normal retirement age under the plan is the earliest age beyond which the participant's benefits under the plan are not greater solely on account of his age or service. For purposes of paragraph (b)(1)(ii)(B) of this section, participation commences on the first day of the first year in which the participant commenced his participation in the plan, except that years which may be disregarded under section 410(a)(5)(D) may be disregarded in determining when participation commenced.

(2) Examples. The provisions of this paragraph are illustrated by the following examples:

Example (1). Plan A defines normal retirement age as age 65. Under the plan, benefits payable to participants who retire at or after age 60 are not reduced on account of early retirement. For purposes of section 411 and the vesting regulations, normal retirement age under Plan A is age 65 (determined

under subparagraph (1)(i) of this paragraph). This is true even if in operation all participants retire at age 60.

Example (2). Plan B does not specify any age as the normal retirement age. Under the plan, participants who have attained age 55 are entitled to benefits commencing upon retirement but the benefits of participants who retire before attaining age 70 are subject to reduction on account of early retirement. For purposes of section 411 and the vesting regulations the normal retirement age under Plan B is the later of (i) age 65, or (ii) the 10th anniversary of the date a plan participant commences participation in the plan (assuming such date is prior to age 70).

....

APPENDIX G

AMERICAN BAR ASSOCIATION
SECTION OF TAXATION
MAY MEETING 1996

COMMITTEE ON
EMPLOYEE BENEFITS

JOINT COMMITTEE ON EMPLOYEE BENEFITS
INTERNAL REVENUE SERVICE

QUESTIONS AND ANSWERS

MAY 10, 1996

* * *

19. § 411(a)(8) Normal Retirement Age

Can an employer amend its plan to change the definition of normal retirement age from age 65 to age 67 so long as there is no violation of § 204(g)?

Proposed Response: No, normal retirement age must be defined at age 65 (or 5 years after an employee begins working) for all purposes including receipt of a full unreduced benefit amount. But see, *Lindsay v. Thiokol,* No. 94 CV 174B (D. Utah 1996), on appeal No. 96-4033 (10th Cir.) (amendment changing normal retirement age to age 67 does not violate ERISA, relying on IRS' grant of application for tax qualification).

IRS Response: The IRS agrees with the proposed answer. The latest normal retirement date permitted under the statute is age 65. The IRS was unable to locate the case in time before the meeting, and so has no comment on the decision. A plan with a determination letter would have reliance on the plan's qualified status. Normal retirement age is used for both vesting and the accrual rules. Using an age 67 normal retirement age for benefit accrual may create a problem under the accrual rules.

....

APPENDIX H

U.S. CORPORATIONS WITH NORMAL RETIREMENT AGE GREATER THAN 65

(List submitted by Thiokol to Court of Appeals)

A.O. Smith Corporation
ARCH Mineral Corporation
Centermark Properties, Inc.
Colonial Life & Accident Insurance Co.
Columbia Gas Development Corp.
Consumers Power Company—Union
ENSERCH Corporation
Federated Department Stores, Inc.
Fireman's Fund Corporation
Gerber Products Company
Hillenbrand Industries
Honeywell, Inc.
Hughes Aircraft Company
Johnson Controls, Inc.
Kohler Company
MAPCO, Inc.
McKesson Corporation
NBD Bancorp, Inc.
Norwest Corporation
Parker Pen USA Limited
PPG Industries, Inc.
Rockwell International Corporation
SPX Corporation
Sta-Rite, Inc.
Tampa Electric Company
Tampa Electric Company—Union
The Upjohn Company
The Knoll Group
Underwriters Laboratories, Inc.
University of Minnesota Hospital and Clinic

Supreme Court, U.S.
FILED
AUG 15 1997
CLERK

No. 97-107

In The

Supreme Court of the United States

October Term, 1996

GRANT T. LINDSAY, F. BRUCE STEVENS, RUSSELL M. RASMUSSEN, AND THOMAS C. LABAU,

Petitioners,

v.

THIOKOL CORPORATION AND THIOKOL CORPORATION PENSION PLAN,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESTATEMENT OF QUESTION PRESENTED

May a pension plan have a formula which uses age 67 as the arbitrary benchmark from which the level of benefits are calculated, where the plan complies with all substantive requirements of ERISA, allowing each employee to retire at age 65 with the full, nonforfeitable benefit he has accrued, and where ERISA mandates no particular benefit level or formula?

ENTITIES RELATED TO RESPONDENT THIOKOL CORPORATION

Pursuant to Sup. Ct. R. 29.6., Thiokol Corporation submits the following list of affiliated entities:

Huck International, Inc.

Huck S.A.

Huck International GmbH & Co.

Huck International Ltd.

Thiokol Holding Co.

Howmet Corporation

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STATEMENT OF THE CASE

Thiokol Corporation's 1991 pension plan amendment discontinued, prospectively only, a subsidy[1] for retirement before age 65. The amendment protected all accrued benefits, including accrued early retirement subsidies. No Petitioner is claiming his accrued benefits were affected.

The subsidy was eliminated in part because of the Tax Reform Act of 1986 ("TRA 86").[2] TRA 86 forced Thiokol to choose between eliminating the subsidy or making major adjustments to benefit levels to narrow the monetary gap, or "permitted disparity," between the pension benefits of highly paid, long-service employees – like the Petitioners – and the benefits of other employees.

In addition, aerospace industry experts were predicting a future shortage of highly skilled workers. Thus,

---

[1] An "early" retirement benefit normally consists of the "actuarial equivalent" of the benefit which the employee has earned and would receive if he began receiving benefits at a plan's "normal retirement age." When the employee does not wish to wait until the plan's normal retirement age to receive benefits, the payment is actuarially reduced to account for the fact that it is being paid earlier, and will therefore be paid over a longer period of time.

Similarly, if an employee postpones retirement until after a plan's "normal retirement age," the benefit may be actuarially enhanced because it will be paid over a shorter period of time. In either case, the benefit received is the full benefit earned.

An early retirement "subsidy" provides the early retiree a benefit which has not been fully actuarially reduced. No employer is required even to allow retirement before age 65, let alone "subsidize" it.

[2] Tax Reform Act of 1986, Pub. L. No. 99-509, 100-203, 100-418, 100-647, 101-73, 101-221, 101-508, 104-188 (1986).

Thiokol no longer wished to encourage early retirement by subsidizing it. To encourage workers to stay even beyond 65, Thiokol offered significantly enhanced benefits at ages 66 and 67. It is undisputed that this later retirement "bonus" was never offered to nor expected by participants retiring at age 65.[3]

Overall, the 1991 amendment enriched and benefited the plan. Thiokol's contribution to the plan increased by approximately $900,000 per year to fund increased benefits. The age 65 benefits of most participants remained the same or increased. Approximately 550 participants received substantial benefit increases because the amendment "bridged" a prior break in service.

The Petitioners retired early. Thus, the elimination of the early retirement subsidy impacted their benefits. In addition, these Petitioners are among a relatively small group of highly paid, long service employees whose benefit accrual rates were lowered slightly by the 1991 amendment to comply with the "permitted disparity" rules of TRA 86.

No benefit – not the benefits of these Petitioners nor anyone else – was rendered lower simply because it was calculated from age 67, rather than age 65. The designation of a point from which to calculate the benefit is a discretionary decision – simply one element in a

---

[3] This fact is significant, as explained later in the text, because it means that even if Petitioners somehow prevailed on their claims here, they would receive no higher benefits. For this and other reasons, Petitioners' claims are insubstantial and Petitioners lack standing even to bring them.

formula – which does not, by itself, determine the level of benefits.

Thiokol determined the level of benefits it wished to offer, then selected a formula calculating benefits from age 67, because it required only reductions for retirement before that age. Thiokol could have expressed the identical benefits with a formula calculating from age 65, with reductions before 65, and additions after 65. In fact, the identical benefit could be calculated from any number of ages, simply by adjusting other elements of the formula. Respondents' Appendix A contains two charts from the Record illustrating how this works.

The formula using age 67 was simplest, so Thiokol chose it. If Thiokol had chosen the age 65 formula, Petitioners would be receiving exactly the same benefit. The same number of dollars would be called a "full" benefit under the age 65 formula, and a "reduced" benefit under the age 67 formula. Thus, the "reductions" of which Petitioners complain are illusory, because they are made from a hypothetical projected benefit. It is undisputed that Petitioners, even under the age 67 formula, receive the entire benefit they had earned, or accrued, at their retirement.

Petitioners Rasmussen and Stevens filed objections to Thiokol's plan with the I.R.S., asserting the plan violated ERISA by using age 67 as its benchmark. The I.R.S. at first requested that the plan be amended to change the benchmark. However, when Thiokol pointed out that the plan complied with all statutory requirements at age 65, the I.R.S. approved the plan, issuing a favorable determination on May 17, 1994. The I.R.S. approved a restated

plan – still calculating benefits from age 67 – on January 19, 1995.

Petitioners brought suit in the United States District Court for the District of Utah, alleging four counts based on Thiokol's calculation of benefits from age 67, and two counts alleging procedural violations. All counts were dismissed on summary judgment. On appeal, the Petitioners abandoned their procedural claims. The Tenth Circuit affirmed the District Court's decision on the remaining claims.

ARGUMENT

No "compelling reason" for granting the writ is present in this case. *See* Sup. Ct. R. 10. The petition for certiorari is a deceptive attempt to create the illusion that something significant is at stake. In fact, Petitioners' entire argument is a play on words with no substance at all.

There is no conflict among circuits. Sup. Ct. R. 10(a). This question has never been addressed by any circuit other than the Tenth Circuit.

Despite Petitioners' alarmist prose, the decision in this case will not make one dime's difference to other workers and pensioners in this country. Furthermore – though they seem to believe otherwise – a victory in this case would not result in higher benefits for Petitioners, either. Thus, the question presented by Petitioners is not an "important federal question." Sup. Ct. R. 10(b).

I. PETITIONERS' ARGUMENT IS MERELY A PLAY ON WORDS, DELIBERATELY GARBLING TWO DISTINCT USES OF THE TERM "NORMAL RETIREMENT AGE."

Petitioners cobbled together their argument by confusing two distinct uses of the term "normal retirement age." After having their mistake in logic explained to them at the I.R.S., the Utah District Court, and the Tenth Circuit, Petitioners' confusion must, by this time, be deliberate.

A. ERISA Defines "Normal Retirement Age" Only for Its Internal Purposes.

ERISA defines "normal retirement age" at 29 U.S.C. § 1002:

> **For purposes of this title** . . . (24) The term "normal retirement age" means **the earlier of** – (A) the time a plan participant attains **normal retirement age under the plan, or** (B) the later of – (i) the time a plan participant attains **age 65**, or (ii) the 5th anniversary of the time a plan participant commenced participation in the plan. (Emphasis added)

Tellingly, Petitioners usually omit the critical, limiting introductory phrase emphasized above, stating that the definition is "for purposes of" ERISA. Moreover, on its face, § 1002(24) recognizes that "normal retirement age under the plan" is distinct from the statutory definition. This subsection also allows for the possibility that "normal retirement age under the plan" may sometimes be earlier, and sometimes be later, than age 65 (subsection

(B)(i)), or even later than some age greater than 65 (subsection (B)(ii)).

ERISA employs this definition in its substantive provisions to require vesting of a participant's entire accrued benefit no later than age 65 and payment of benefits by that age if a participant so desires. It is undisputed that Thiokol's plan vests no later than age 65 and that it provides for payment at 65 of the entire benefit a participant has earned by that age.

Beyond ERISA's express substantive requirements, the statute's definitional provisions do not give rise to any substantive right to have benefits calculated in any specific way. *DeNobel v. Vitro Corp.*, 885 F.2d 1180, 1192 (4th Cir. 1989).

B. The Term "Normal Retirement Age" Is Used Outside ERISA to Mean the Benchmark Age from Which Benefits Are Calculated; a Usage Which Is Not Mentioned in, nor Regulated by, ERISA.

The term "normal retirement age" has another meaning to pension plan designers – a meaning which predates, and is distinct from, ERISA's statutory uses. "Normal retirement age" is also the name for the discretionary "benchmark" age discussed in the Statement of the Case. It is the age at which a hypothetical benefit is calculated, making additions to, or subtractions from, the hypothetical benefit to arrive at the benefit payable at the time retirement actually takes place.

Nothing in ERISA requires that plan formulae calculate benefits from any particular age. Nothing in ERISA

expressly caps the age from which benefits must be calculated. Petitioners argue that this Court should read such a requirement into the statute. As the Tenth Circuit recognized, however, "There is no support for the argument that the statute should be judicially rewritten to make this modification." (Petrs. App. 3a.)

There is no support for a number of reasons. First, as explained above, the designation of a benchmark does not, by itself, determine benefit levels.

Second, any employer can avoid this entire argument simply by calling its benchmark something other than "normal retirement age." If Thiolol had calculated its benefit from age 67, but called age 67 "the benchmark," or "regular retirement age," or "target retirement age," or even "George," the Petitioners would have no argument at all. As the Tenth Circuit stated

> Plaintiffs do not dispute that the substance of Thiokol's plan could satisfy ERISA with only a change in terminology. Where the dictates of a statute regulating verbally defined benefits can be satisfied by various terms, there is no rational basis for a court to read into the statute a requirement of the use of speific words absent an express provision in the statute governing terminology.

(Petrs. App. 8a.)

Finally, as explained more fully below, even if the designation of a benchmark overage 65 did, by itself, reduce future benefit accruals – as Petitioners deceptively assert – ERISA permits such reductions.

II. THE TENTH CIRCUIT'S DECISION CHANGES NO LAW AND WILL IMPACT NO OTHER WORKERS OR PENSIONERS, BECAUSE EMPLOYERS HAVE ALWAYS BEEN FREE TO LOWER, OR EVEN ELIMINATE, FUTURE BENEFIT ACCRUALS.

The Tenth Circuit's decision changes nothing in ERISA. There has never been an express or implied limit on the benchmark age for calculating benefits, and other plans have adopted benchmarks over 65. Furthermore, if a limit on the benchmark were now imposed, it would make no substantive difference because there are a number of other ways to reduce benefit levels, and employers have always been free to raise or reduce future benefit accruals, or to eliminate them entirely, subject only to certain restrictions, such as prior notice, not relevant here.

ERISA does not require employers to provide a pension. *See, e.g.*, H.R. Rep. No. 807, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 4670, 4677 ("[A]n employer has no affirmative duty to provide employees with a pension plan."). If an employer chooses to offer a pension, it can establish the benefit levels it desires and can afford. *Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 521 (1981). ERISA guarantees no particular method or formula for calculating those benefits. *Id.* at 512.

Moreover, once a plan is established, an employer is free to amend it to provide lower future benefits, as long as the employer preserves benefits already earned by each employee. "ERISA only requires that *accrued* benefits not be reduced by amendment of the plan. It does not instruct the employer to adopt a plan and then maintain

it in perpetuity pursuant to its original terms." *Gluck v. Unisys Corp.*, 1991 WL 14083, at *13 (E.D. Pa. 1991), *aff'd in part, rev'd in part on other grounds*, 960 F.2d 1168 (3d Cir. 1992) (emphasis added).

In sum, Congress was not concerned with establishing, or even maintaining, any particular level of benefits, nor was it concerned with dictating the formulae by which benefits are calculated. Rather, ERISA seeks to ensure that a benefit defined and promised *by the employer* is not reduced *after* an employee has earned it. Thiokol carefully protected all accrued benefits when amending its plan, and there is no claim to the contrary here.

Petitioners disingenuously claim that the Tenth Circuit's decision will result in employers everywhere lowering future retirement benefits by raising the benchmark from which benefits are calculated. (Pet. 8.) As explained above, Petitioners' benefits were *not* reduced by the designation of age 67 as the benchmark. Petitioners' benefits are somewhat lower after the plan amendment primarily because early retirement is no longer encouraged by a subsidy, and, to a much smaller degree, because Petitioners' previous age 65 benefits were too high to conform to TRA 86.

But, even if Thiokol had chosen to lower the plan's future benefits simply by moving the benchmark age forward, it was free to do so. Whether a future benefit reduction is accomplished by moving forward the benchmark age or by changing some other element of the plan formula, it makes no substantive difference to anyone.

III. A VICTORY ON THE QUESTION ON WHICH CERTIORARI IS SOUGHT WOULD NOT INCREASE PETITIONERS' BENEFIT.

Petitioners seem to believe they can void Thiokol's 1991 plan amendment and force a temporary return to the previous plan, thus obtaining for themselves the discontinued early retirement subsidy. However, even if Petitioners somehow prevailed in this Court, under ERISA's remedial scheme they might get their attorney fees, but nothing more.

There is no support anywhere in ERISA or in the case law for the proposition that a pension plan amendment is void *ab initio* due to the sort of violation alleged by these Petitioners. Rather, the relief provided by ERISA includes *only* "those categories of relief that were *typically* available in equity. . . . " *Mertens v. Hewitt Associates*, 508 U.S. 248, 256 (1993) (emphasis in original). Thus, at most, if Petitioners' interpretation of ERISA were correct, a court would apply the equitable remedy of reformation to make the plan comply with Petitioners' version of the law.

However, a court could not "reform" Thiokol's plan simply by rewriting it to make 65 the age from which benefits are calculated and leaving all other elements of the formula the same. That would have the effect of forcing Thiokol to pay the age 67 "bonus" at age 65. This is not "reformation," and it is beyond the court's remedial power under ERISA.

An agreement can only be "reformed" in equity to "reflect the parties' true intentions." Dan B. Dobbs, *Remedies* § 4.3 at 256 (1973). Thiokol never intended to

offer the age 67 bonus at 65, and no participant can claim he was ever promised it. These Petitioners have absolutely no equitable claim to the enhanced age 67 benefit at age 65, or to any correspondingly higher early retirement benefit calculated by assuming the age 67 bonus should apply at age 65.

Therefore, even if Petitioners were correct in asserting that ERISA prohibits calculation of benefits from any age over 65, the appropriate remedy would be to reform the plan by inserting the age 65 formula found in Appendix A, hereto. That formula would comply with Petitioners' version of the law *and* with the parties' intention. Petitioners would still receive exactly the same benefit they are now receiving.

When Thiokol pointed out in the district court that Petitioners were not entitled to any of the remedies they sought, Petitioners could respond only with, "The court can think of something." It is not that simple. Because the injury of which these Petitioners complain – lower benefits – would not be redressed with a victory on their claims here, these Petitioners lack standing even to bring the claims.

IV. THERE IS NO CONFLICT AMONG CIRCUITS.

No other circuit court has ever been asked to address the question presented by Petitioners and decided by the Tenth Circuit. Thus, no conflict exists. The cases cited by Petitioners deal with substantive statutory protections provided by ERISA, such as vesting and payment of benefits. *Johnson v. Franco*, 727 F.2d 442 (5th Cir. 1984)

(vesting); *Janowski v. Teamsters Local 710*, 673 F.2d 931 (7th Cir. 1981) (vesting and payment of benefits). Thus, it is not surprising that discussions of "normal retirement age" in these cases reflect the statutory limit for vesting and payment of benefits – age 65.

Neither *Johnson* nor *Janowski* addressed the question of whether a plan which complies with all ERISA's substantive provisions may calculate benefits from an age greater than 65. Thus, any language in those cases which seems to broaden the meaning of ERISA's statutory definition is mere dicta, and insufficient to constitute a conflict among circuits.

V. THE LEGISLATIVE HISTORY ADDS NOTHING TO PETITIONERS' ARGUMENT.

The lower courts did not simply forget to read ERISA's legislative history, as Petitioners seem to suggest. The legislative history, read in context, says nothing more than what everyone concedes: ERISA caps "normal retirement age" at 65 for its substantive requirements, such as vesting and commencement of benefit payments. Thiokol's plan indisputably conforms to each substantive requirement of ERISA.

VI. APPLICABLE REGULATIONS SUPPORT THE LOWER COURTS' DECISIONS.

Petitioners cite regulations which are ambiguous and which simply restate ERISA's definition of "normal retirement age," and which, like ERISA's definition, expressly limit their application to the "part" or "chapter" in which

they are found. (Petrs. App. 23a-26a.) Significantly, Petitioners have cited *no* regulations governing the benchmark age from which benefits must be calculated, because none exist.

By contrast, I.R.S. regulations expressly *permit* a participant's accrued benefit at age 65 to be expressed as the actuarial equivalent of a retirement benefit calculated from some other age. The I.R.S. regulation defining "accrued benefit," 26 C.F.R. § 1.411(a)-7(a), states in pertinent part:

> **(a) Accrued benefit.** For purposes of section 411 and the regulations thereunder, the term "accrued benefit" means –
>
> (1) *Defined benefit plan.* In the case of a defined benefit plan –
>
> (i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or
>
> (ii) If the plan does not provide an accrued benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age **which is the actuarial equivalent . . . of the accrued benefit determined under the plan**. (Emphasis added.)

This regulation expressly refutes Petitioners' argument that ERISA requires the benefit payable at age 65 to be the so-called "full" benefit – meaning a benefit calculated from age 65. This regulation specifically permits "actuarial adjustment" – which can mean an actuarial reduction or an actuarial enhancement – of a hypothetical benefit calculated at some other age. No matter the formula by which it is expressed, the benefit which was

promised is still being paid. As the Tenth Circuit recognized, "Regardless that the 65-year-old retiree's benefit [under Thiokol's plan] is 86.7% of some other quantity, the 65-year-old's entitlement to that plan-defined retirement benefit is afforded the full protection required by ERISA." (Petrs. App. 4a.)

Furthermore, 26 C.F.R. § 1.411(a)-7(b)(2), Example (2), describes a plan which calculates benefit from age 70, actuarially reducing for retirement before that age, and states only that "[f]or purposes of section 411 and the vesting regulations," normal retirement age can be no later than 65. (Petrs. App. 28a.)

Thus, ERISA's regulations provide both express and implied support for the lower courts' decisions.

CONCLUSION

The Petition in this case misleads by misstating facts and law. Petitioners' benefits have **not**, as Petitioners assert, been "reduced" in any real way merely because they are now calculated from age 67. Petitioners' benefits have **not**, as Petitioners imply, been "reduced" from the amount they have earned. Neither these Petitioners nor anyone else would be entitled to higher benefits if the benchmark age were capped at 65, as Petitioners imply.

There is no conflict among circuits, because this question has never before been addressed. The Tenth Circuit's decision did not work any change in the law, and did not "create[] confusion where before there was none," as Petitioners allege. (Pet. at 7.) There never was a cap on

the age from which benefits are calculated, because it makes no substantive difference. The Tenth Circuit and the Utah District Court simply saw past the cynical confusion which these Petitioners – not the Tenth Circuit – have created.

Thiokol respectfully requests that certiorari be denied.

DATED: August 15, 1997.

Respectfully submitted,

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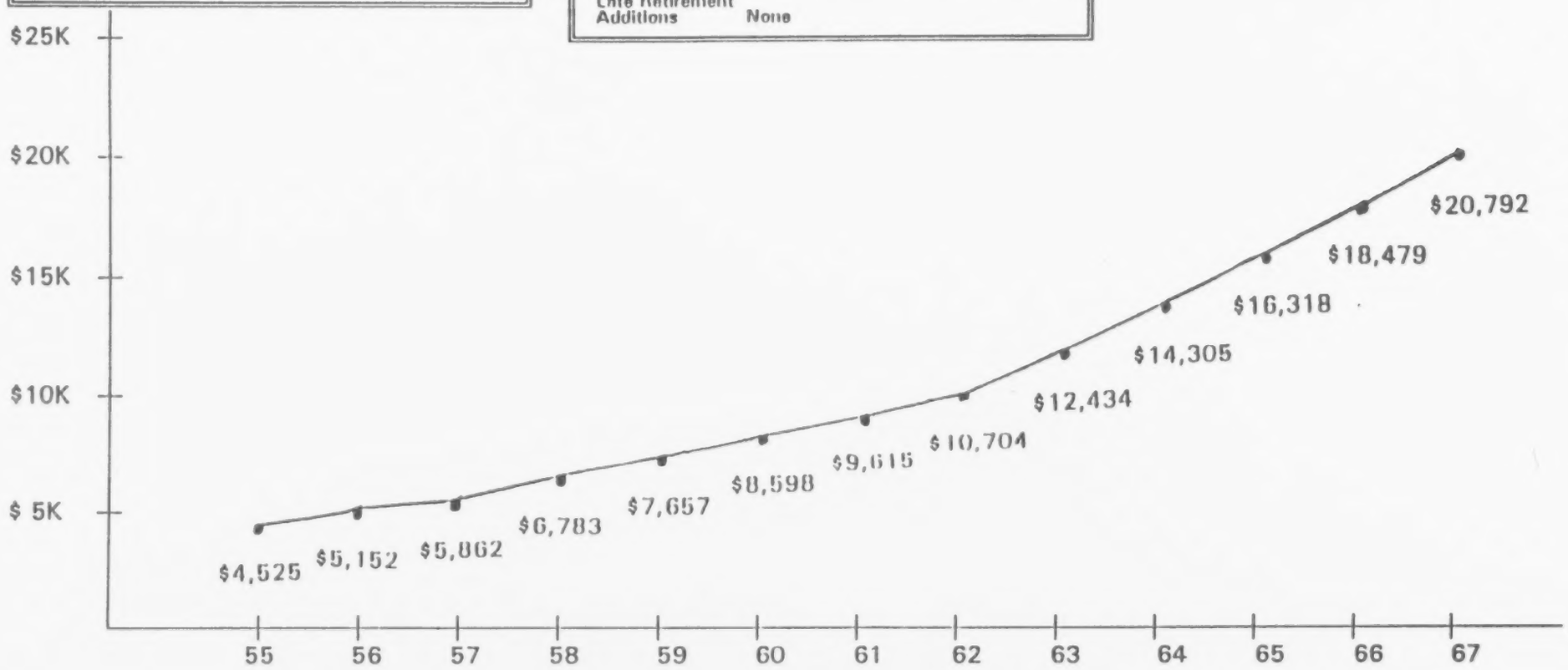
Admission to This Court

APPENDICES

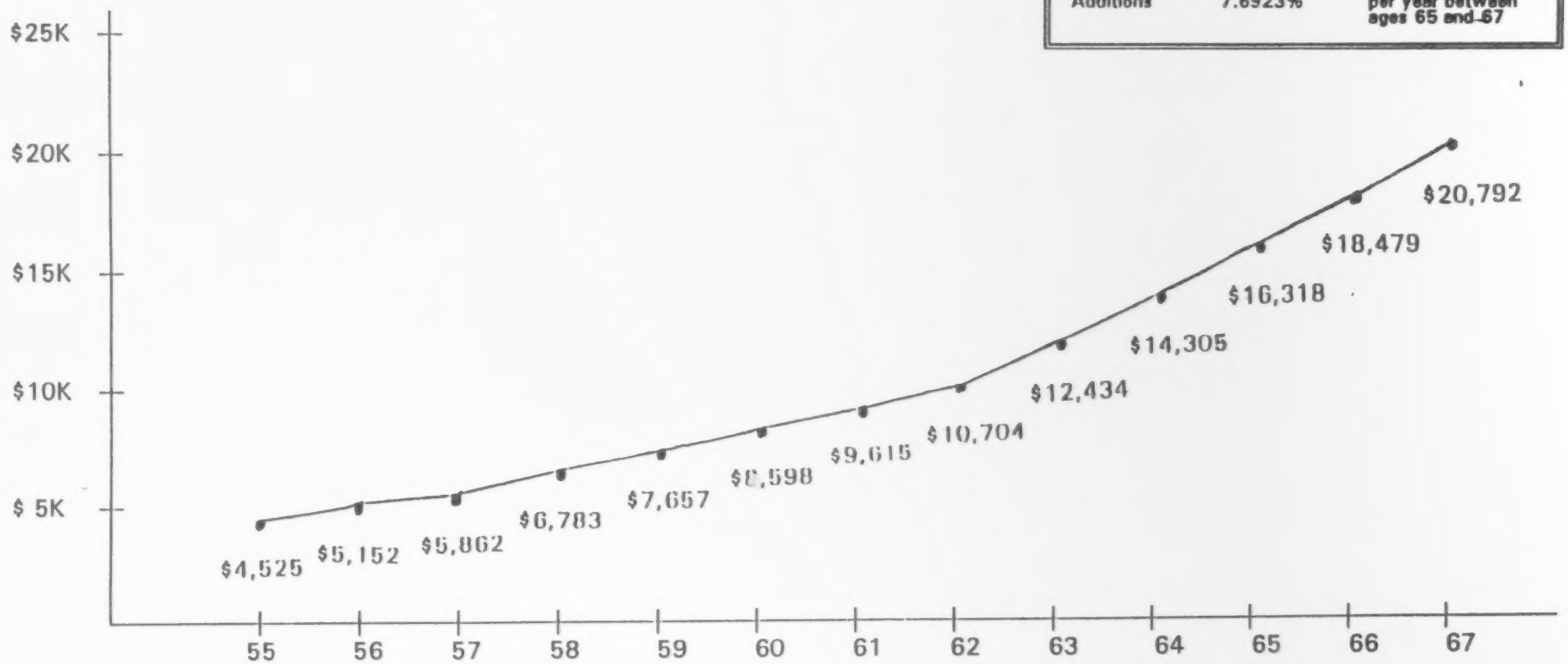
APPENDIX A BENEFIT FORMULA

SAMPLE EMPLOYEE (RETIRING IN 1995)	
FINAL AVERAGE PAY:	$40,000
SERVICE AT AGE 55:	20
SERVICE PRIOR TO 1/1/84:	9

NORMAL RETIREMENT AGE = 67		
Formula	1.48% FAP x pre-1/84 service	
	+ 1.23% FAP x post-1/84 service	
	+ .75% FAP in excess of covered compensation x service up to 35 years	
Early Retirement Reductions	6-23%	per year between ages 62 and 67
	3-1/3%	per year between ages 57 and 62
	4.13%	from age 57 to age 56
	3.73%	from age 56 to age 55
Late Retirement Additions	None	



NORMAL RETIREMENT AGE = 65		
Formula	1.282667% FAP x pre-1/84 service	
	+ 1.066% FAP x post-1/84 service	
	+ .65% FAP in excess of covered compensation x service up to 35 years	
Early Retirement Reductions	7.6923%	per year between ages 62 and 67
	3.8462%	per year between ages 57 and 62
	4.7688%	from age 57 to 56
	4.3073%	from age 56 to 55
Late Retirement Additions	7.6923%	per year between ages 65 and 67



APPENDIX B

26 C.F.R. § 1.411(a)-7

§ 1.411(a)-7 Definitions and special rules.

(a) Accrued benefit. For purposes of section 411 and the regulations thereunder, the term "accrued benefit" means –

(1) Defined benefit plan. In the case of a defined benefit plan –

(i) If the plan provides an accrued benefit in the form of an annual benefit commencing at normal retirement age, such accrued benefit, or

(ii) If the plan does not provide an accrued benefit in the form described in subdivision (i) of this subparagraph, an annual benefit commencing at normal retirement age which is the actuarial equivalent (determined under section 411(c)(3) and § 1.411(c)-5 of the accrued benefit determined under the plan. In general, the term "accrued benefits" refers only to pension or retirement benefits. Consequently, accrued benefits do not include ancillary benefits not directly related to retirement benefits such as payment of medical expenses (or insurance premiums for such expenses), disability benefits not in excess of the qualified disability benefit (see section 411(a)(9) and paragraph (c)(3) of this section), life insurance benefits payable as a lump sum, incidental death benefits, current life insurance protection, or medical benefits described in section 401(h). For purposes of this paragraph a subsidized early retirement benefit which is provided by a plan is not

taken into account, except to the extent of determining the normal retirement benefit under the plan (see section 411(a)(9) and paragraph (c) of this section). The accrued benefit includes any optional settlement at normal retirement age under actuarial assumptions no less favorable than those which would be applied if the employee were terminating his employment at normal retirement age. The accrued benefit does not include any subsidized value in a joint and survivor annuity to the extent that the annual benefit of the joint and survivor annuity does not exceed the annual benefit of a single life annuity.

Supreme Court, U.S.
FILED
AUG 25 1997
CLERK

(3)

No. 97-107

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

GRANT T. LINDSAY, F. BRUCE STEVENS,
RUSSELL M. RASMUSSEN, and THOMAS C. LABAU,
Petitioners,

v.

THIOKOL CORPORATION and THIOKOL
CORPORATION PENSION PLAN,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE TENTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Thiokol's Brief In Opposition ("Opp.") is primarily an effort to convince the Court that the question raised in the Petition is not fairly presented by the case. Secondarily, the Opposition is an effort to show that in any event, the question should be resolved in Respondents' favor, either because Thiokol could have effected the same reduction in benefits without changing normal retirement age or because the law permits the establishment of normal retirement ages over age 65. However, once Thiokol's arguments are compared with the record and the undisputed factual findings of the courts below, the truth emerges with considerable clarity that this case represents an ideal vehicle to settle a question of broad national importance to millions of working men and women and their families. Moreover, it is quite clear that when the language of the statute at issue, its legislative history and its interpretation by the pertinent administrative agencies are fairly considered, there is strong reason to believe that the case below was wrongly decided. The Petition should be granted.

1. The Brief in Opposition can be read to suggest that the challenged amendment was somehow necessitated by the Tax

Reform Act of 1986 (Opp. at 2). However, in the proceedings below, Thiokol was explicit that it could have complied with the Tax Reform Act without making any change in the normal retirement age. [1] There should thus be no confusion concerning any implication that the setting of a normal retirement age in excess of age 65 was necessitated by any legislation. It was not. Companies do not have to raise normal retirement ages for their retirement plans; they *want* to—and have begun doing so [2]—for the reasons of corporate self-interest discussed in the Petition and not disputed in the Opposition.

2. So, too, with Thiokol's representation that Petitioners' benefits were in fact not lowered at all by the challenged increase in normal retirement age. (Opp. at 2, 9, 14.) In the district court, Thiokol unsuccessfully moved to dismiss for lack of standing based on that same assertion. Aplt. App. at 120. The assertion is demonstrably incorrect and was found to be so by the district court; as the district court found in denying Thiokol's motion, Petitioners receive "substantially" smaller monthly benefits than each of them would be receiving if normal retirement age were still age 65, any *other* changes Thiokol made to its plan notwithstanding. (Pet. App. 12a.)

Indeed, this must be so for two reasons. Tellingly, Thiokol has disputed neither in its Brief In Opposition. First, the higher that normal retirement age is set, the fewer the number of workers who will attain it, whether due to layoffs, plant relocations, illnesses or other causes. (Thus Thiokol predicted that fully 80% of its pension plan participants would not achieve the new normal retirement age of 67. Aplt. App. 221, 230.) Workers that do not attain "normal retirement age" and receive a "normal retirement pension" will therefore receive a *reduced* "early retirement" pension.

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1. The Court: But Ms. Wood, the Plan could have been amended to comply with the new Tax laws without changing the age from 65 ....

Ms. Wood: It absolutely could have done it...." Aplt. App. at 1489-90.

2. Thus the Opposition makes the point that Thiokol is not alone in raising normal retirement age above 65, that "*other* plans have adopted benchmarks over 65." Opp. at 8; emphasis added. Thiokol made the same point to the court below; at page 30a of the Appendix to the Petition is a list of thirty major corporations across the country that Thiokol identified as having adopted normal retirement ages in excess of age 65.

The second truth follows from the first: the higher that normal retirement age is set, the smaller the early retirement pension that the workers receive. It is a simple matter of mathematics: an employee receiving a pension at age 63 suffers a *two*-year reduction in the size of his or her pension if the normal retirement age is 65 (roughly 13%), but suffers a *four*-year reduction (roughly 26%) if the normal retirement age is 67, a *seven*-year reduction (more than 35%) if it is set at age 70, and so forth. It therefore follows inevitably that an increase in normal retirement age beyond age 65 is going to mean that more workers will receive a smaller pension at retirement, and the higher the normal retirement age is set the smaller those pensions will be. Thus, while the Opposition asserts that "the decision in this case will not make a dime's worth of difference to other workers and pensioners in this country" (Opp. at 4), that assertion is untenable. Quite to the contrary, the decision in this case will affect profoundly the lives of millions of workers and their families.

3. The rule announced by the court below—that ERISA does not impose a limit of age 65 on how high plans can set their "normal retirement age"—had nothing to do with the particulars of Thiokol's plan and was in no way fact-specific. Nor did it turn on the fact that Thiokol's new normal retirement age was 67 rather than some higher age. As Thiokol expressly argued below, it could just as easily have been age 80 or 90. (Aplt. App. at 1494.) Rather, the court below announced a broad rule that employers are not limited by ERISA in setting normal retirement ages in excess of age 65, and was explicit that the appeal presented "a pure question of law."

4. As a last means of arguing that the question is not of significance, Thiokol argues that by manipulating other aspects of the retirement formula it could have achieved the same reduction in petitioners' pensions without increasing the normal retirement age beyond age 65. (Opp. at 3, 8, 9.) It would make no difference if respondents were correct in their assertion of what they claim they might have done. [3] What Thiokol *might* have done is irrelevant.

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3. The accuracy of Thiokol's assertion that benefits could have been lawfully lowered to the same level by clearly permissible means has never been tested, litigated nor passed upon by any court. Respondents first

This Court has never countenanced the argument that illegal conduct should be excused if the same result could have been achieved by legal means. [4]

5. When it turns to the merits, Thiokol is correct in stating that the term "normal retirement age" predated ERISA (Opp. at 6), but is incorrect—and this is the nub of the controversy—in asserting that the term "is distinct from ERISA's statutory uses." (*Id.*) Quite the opposite, it is precisely *because* the term predated ERISA that ERISA addressed it and set limits on how high employers could establish the normal retirement age in their plans.

The plain wording of the statute leaves no room for dispute on this question. Both "mirror image" definitions of "normal retirement age"—29 U.S.C. § 1002(24) and 26 U.S.C. § 411(a)(8)—unambiguously cap it at age 65. Only by continuing to ignore the plain wording of the statute is Thiokol able to construct its argument that the statutory definition is "for purposes of ERISA" but *not* plan documents. Tellingly, in making this argument, the Opposition does not even mention ERISA's coverage provision, 29 U.S.C. § 1003(a), which expressly provides that the definitions set out in the statute (including the statutory definition of normal retirement age) "shall apply to any employee benefit *plan*." (*See* Petition at 9.) While it seems too clear for debate that the limit on normal retirement ages established by 29 U.S.C. § 1002(24) would have to apply to pension plans, 29 U.S.C. § 1003(a) makes the obvious explicit. The Opposition's complete

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suggested this possibility in their reply memorandum in support of their motion for summary judgment in the district court. Aplt. App. at 645-46. Since the matter had never been raised before and there had been no discovery on it, plaintiffs moved to strike. Aplt. App. at 928. The motion to strike was briefed, but not ruled upon by the district court. The documents reproduced in Appendix A to the Brief In Opposition were visual aids, not admitted exhibits, used by Thiokol in oral argument in the district court, never subject to discovery or examination or any legal ruling.

4. See, for example, *Commissioner v. National Alfalfa Dehydrating & Milling Co.*, 417 U.S. 134, 149 (1974):

> To make the taxability of the transaction depend upon the determination whether there existed an alternative form which the statute did not tax would create burden and uncertainty.

silence on this point—which goes to the very heart of its main argument—cannot be an oversight.

6. Similarly, Thiokol does not cite a single instance—not one—in ERISA's entire legislative history where any senator, congressman or committee report at any point indicated, much less stated, that normal retirement ages greater than age 65 were permissible for plans after the enactment of ERISA. Nor could it. As demonstrated in the Petition (at 9-11), the legislative history is indubitably clear that in passing ERISA Congress intended that no plan would be permitted to have a normal retirement age in excess of 65 and said so repeatedly and plainly. As the Joint Explanatory Statement of the House and Senate Conference Committee of the final version of ERISA stated, "Normal retirement age generally is to be the age specified in the plan. However, *it may not be later than age 65****." (Emphasis added.) Significantly, Respondents do not dispute that the Petition has accurately set forth this Court's jurisprudence on the importance of interpreting a statute in accordance with clearly expressed congressional intent. Instead, they simply ignore that clearly expressed intent in their Brief In Opposition.

7. Thiokol offers no defense for the failure of the court below to examine or even mention the agency views on the question presented. *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837, 842-43 (1984). With respect to the PBGC regulation, with its clear statement that "Normal retirement age means the age specified in the plan" and that "this age shall not exceed *** age 65 ****," 29 C.F.R. § 400.12 (1996), and the similar regulations cited in the Petition (Pet. at 11-13), Thiokol dismisses them as "ambiguous" (Opp. at 12). The sole regulation cited by Thiokol, 26 C.F.R. § 1.411(a)-7(a) (Opp. at 13) makes no mention of how high a normal retirement age may be, much less make any provision for a normal retirement age in excess of 65. [5]

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5. Thiokol refers (Opp. at 3) to its obtaining an IRS determination letter from a Texas district office over the *pro se* objection of two of the Petitioners here. Notably, Thiokol has correctly abandoned any argument that the issuance of a determination by a district office is entitled to deference. As noted in the Petition (footnote 11), in May of 1996 the IRS subsequently expressed its agreement *with Petitioners' position* that "[t]he

Thiokol protests that Petitioners have cited no regulations "governing the *benchmark* age ..." Opp. at 13; emphasis added. This concept of "benchmark" age is not part of ERISA; **it exists only in Respondents' briefs**. ERISA does not speak of a "benchmark" age or use any such concept, and Respondents neither in their Opposition nor at any time in this litigation have ever offered any authority for it. It is their own invention.

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latest normal retirement date permitted under the statute is age 65." Petition at 29a.

CONCLUSION

Thiokol cannot dispute the significant effect that increasing normal retirement age has on workers. Accordingly, it is left to argue that the decision below will impact on no other workers (Opp. at 8) *not* because normal retirement ages in excess of 65 will not have a significant negative effect on them, but, rather because of the argument that the decision below "changes no law" and that employers have "always been free" to take such actions. (*Id.*) With respect, this begs the question. Regardless of which side has offered the correct answer to the question presented by the Petition, there cannot be legitimate debate as to the impact on millions of workers that the answer to that question will have. The Petition should be granted.

DATED: August 25, 1997

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